In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 215

LEON ADJMI AND JOSEPH ADJMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 343 F. 2d 164.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1965. A petition for rehearing was denied on May 13, 1965. The petition for a writ of certiorari was filed on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit, for the purpose of proving fraudulent intent, evidence of petitioners' similar closely connected acts of mail fraud in con-

nection with false fire insurance claims other than those alleged in the indictment.

2. Whether an erroneous instruction withdrawn by the trial court on petitioners' objection was adequately corrected by the remainder of the charge and by a supplemental instruction.

STATEMENT

Petitioners and three codefendents [1] were convicted by a jury in the United States District Court for the Middle District of Florida on all counts of a three-count indictment charging mail fraud and conspiracy in violation of 18 U.S.C. 1341 and 371 (R. I, 3–5, 49–52). Both petitioners were sentenced to ten years' imprisonment [2] and fined $1,000 (R. I, 66–69). The court of appeals affirmed the convictions *per curiam*. The evidence may be summarized as follows:

1. Prior to May 1958, petitioner Leon Adjmi (the father of Joseph) owned Antique Imports, Inc., whose only assets consisted of a lease [3] on business premises in Miami, Florida, and some furniture (R. I, 511–512, 515). In May 1958, codefendant Cohen purchased this business from Leon Adjmi (R. I, 511–512, 515). Shortly before September 25, 1958, merchandise consisting of linens and china belonging to petitioner

[1] Charles Adjmi, Erwin Cohen and J. & C.A. Corporation were tried at the same time under the same indictment and found guilty as charged. Cohen died after affirmance by the court of appeals. The court of appeals reversed the conviction of Charles Adjmi on the ground of insufficient evidence.

[2] Five-year sentences on counts 1 and 2 run concurrently with each other and the five-year sentence on count 3 runs consecutively to the sentences under counts 1 and 2.

[3] The lease ran to Leon Adjmi, Charles Adjmi and Joseph

Joseph Adjmi was moved into Cohen's shop (R. I, 526–528; R. II, 529–530, 615–616). Insurance in force at the time (much of it placed through an agent introduced to Cohen by Joseph Adjmi (R. I, 365–373)) was $210,000 (R. I, 376–377, 384–385). On September 25, 1958, there occurred in the mezzanine section of Cohen's business a small fire which caused little damage, no heavy smoke and no soot or smoke fallout (R. I, 128, 142–143, 149, 158–163, 182–192, 221–224, 231, 246–249, 263, 302–313, 321, 521; R. II, 547). Some time following the fire, the upstairs and downstairs of the premises were covered with a heavy charcoal deposit which was not soot or smoke fallout and did not result from the fire (R. I, 204–205, 312, 358–359, 400–450). There were no smoke stains (R. I, 358–359, 361). Shortly after the fire, the linens and china were picked up by Leon Adjmi and the "Adjmi boys" and taken to Leon Adjmi's home (R. II, 529–533). When the insurance adjuster came to inspect the damaged merchandise, he was told that the principal damaged items had been "moved out and turned over to Mr. Adjmi, Senior" and that they had been moved out of the city (R. I, 492). They were never made available for inspection (R. I, 494–503). Invoices purporting to show a sale in the amount of $58,000 from the J. & C.A. Corporation[4] to Cohen of the goods "borrowed" by Cohen from Joseph

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Adjmi, copartners doing business under the firm name of Adjmi & Sons (R. I, 518).

[4] The corporation was owned by Joseph and Charles Adjmi (R. II, 625, 649–653, 660, 841). Leon Adjmi had loaned money to the corporation (R. II, 651–652, 664–665).

Adjmi were prepared for fire insurance purposes (R. II, 690–696). Cohen submitted and mailed two proofs of loss aggregating $208,000 (R. I, 453–460, 475–482), which was the total of the merchandise inventory (R. II, 531). The claims were ultimately denied for insufficient proof of loss (R. I, 470, 472, 488–503).

2. At the trial the government also introduced the following evidence for the purpose of establishing fraudulent intent:

a. On January 23, 1958, the J. & C.A. Corporation had a fire in an awning, causing the metal frame to fall so as to break the front door (R. II, 953–955). A claim signed by petitioner Joseph Adjmi was supported by invoices which had been altered to increase the cost of the damaged merchandise by at least $2,000 (R. II, 955–957, 976–977).

b. On March 31, 1958, after petitioner Joseph Adjmi had increased the corporation's insurance policies to $250,000 worth of fire protection, the J. & C.A. Corporation had another fire (R. II, 820–831, 840). There was evidence that an $84,000 fictitious sale-of-goods invoice by petitioner Leon Adjmi to the J. & C.A. Corporation was submitted to the insurance company (R. II, 925–940, 947–951) and that the cost of many items was substantially less than the price listed on the invoices submitted to the insurance company (R. II, 905–913, 966–1023, 1034–1065).

c. Another fire occurred on October 8, 1958, at a ladies apparel and sportswear shop, owned by one Mishon, located just a short distance from the Adjmis' business in Miami (R. III, 1079–1080, 1083, 1111–

1115). Prior to the fire, at petitioner Joseph Adjmi's request, additional insurance—to cover seasonal merchandise to be supplied by Joseph Adjmi—was obtained by Mishon on the understanding that Joseph Adjmi would stand behind the $500 premium check that Mishon was reluctant to write because of lack of funds (R. III, 1148–1156). Proofs of loss on the fire submitted to the insurance company (R. III, 1074–1075) included a bill of sale for $141,000 worth of merchandise not reflected in the books of the J. & C.A. Corporation (R. III, 1086, 1092–1097). Merchandise that was the subject matter of the claims was substantially overvalued (R. III, 1162–1237).

ARGUMENT

1. Petitioners' contention that evidence of similar acts of fraud was erroneously admitted at trial and not adequately limited by the court's instructions to the jury (Pet. 15–17) is without merit. Evidence of petitioners' participation in fraudulent claims relating to fires closely connected in time and circumstance to the fraud charged in the indictment was clearly admissible to show petitioners' fraudulent intent.[5] *Weiss* v. *United States,* 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687.

At the close of the trial court's instructions, petitioners objected that the jury had not been adequately

[5] Government counsel argued that this evidence of similar acts was admissible against all defendants, including Cohen, as a part of a single continuous scheme. This theory was rejected by the trial court. *E.g.*, R. III, 1283, 1327. As noted by petitioners (Pet. 9–11), the theory was advanced primarily to support admission of these similar acts by the Adjmis against codefendant Cohen.

warned to limit its consideration of the evidence regarding other fires (R. III, 1450–1451, 1455–1458). As a consequence, the court gave the following additional instructions (R. III, 1468):

> Evidence that an act was done at one time or on one occasion is not any proof whatsoever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.
>
> Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment then under deliberation.
>
> If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular count under consideration, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining the state of mind or intent with which the accused did the acts charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the particular count under deliberation, the accused acted willfully and with specific intent and not because of mistake or inadvertence or other innocent reason.

The foregoing instruction was an accurate statement of the applicable law and it properly limited the jury's consideration of the evidence. It was entirely clear from this supplementary instruction that the jury was not to use the evidence pertaining to other fires in deciding whether petitioners had participated in a scheme to defraud; it bore only on the intent with which they acted if other evidence established their participation.[6]

2. Petitioners contend that another instruction to the jury erroneously shifted the burden of proof and reflected on petitioners' failure to take the stand, and that the error was not cured by the court's withdrawal of the instruction (Pet. 17–19). The challenged instruction stated (R. III, 1423):

> The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted.

The trial court also charged the jury as follows:

> The law presumes the innocence and not the guilt of the accused, and each one of them and this presumption attends and protects them throughout the trial until the Government has overcome such presumption by testimony which

[6] Petitioners also suggest that government counsel erroneously argued that the evidence indicated the Adjmis were engaged in a continuous mail fraud scheme encompassing all four fires (Pet. 11–12). This argument was made in summarizing the evidence and was a permissible inference from the evidence. In any event, petitioners failed to object at the time of counsel's argument and cannot complain at this time.

satisfied you of their guilt beyond a reasonable doubt. [R. III, 1426.]

* * * * *

The defendants did not take the witness stand. The law protects them on that question. They don't have to take the witness stand and the jury should draw no adverse inferences from the fact that they did not take the stand. That is their right and their counsel has a right so to advise them, and the jury should not be influenced in any way by the fact that they did not testify. The responsibility is upon the Government to prove the averments of the indictment to your satisfaction beyond a reasonable doubt * * *. [R. III, 1427.]

After the court completed its charge, government counsel directed the court's attention to the instruction now complained of (R. III, 1441–1442), and the court withdrew it, stating (R. III, 1461):

I think it is proper for me to withdraw that statement. I said the Grand Jury, while they only heard only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted. I withdraw that, because the rule is the defendants, if they testify at all, they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent.

The court of appeals properly concluded that the charge "when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error." Pet. App.

A, p. 23. The very close reading of the words "if they testify at all" which petitioners now take as the basis for their claim (Pet. 18) is not the meaning which was communicated to the jury by the instruction as a whole. The qualifying clause which petitioners now challenge, when taken in context, only emphasized the fact that petitioners were under no duty to testify.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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